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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JAY PRINTZ, Sheriff/Coroner,
Ravalli County, Montana,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

and

SHERIFF RICHARD MACK,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE COALITION TO STOP GUN VIOLENCE *AND* THE EDUCATIONAL FUND TO END HANDGUN VIOLENCE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
STATEMENT	2
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE TEMPORARY BACKGROUND CHECK, RECORD DESTRUCTION, AND EXPLANATION PROVISIONS OF THE BRADY ACT ARE NOT AN UNCONSTITUTIONAL INTRUSION UPON STATE SOVEREIGNTY	8
II. THE BRADY ACT DOES NOT CONTRAVENE THE TENTH AMENDMENT BECAUSE THE FEDERAL INTEREST IN REDUCING THE INCIDENCE OF HANDGUN VIOLENCE GREATLY OUTWEIGHS THE BURDEN PLACED ON STATES' AUTONOMY	13
III. THE INTERIM BACKGROUND CHECK, RECORDS DESTRUCTION, AND EXPLANATION PROVISIONS ARE SEVERABLE FROM THE REMAINDER OF THE BRADY ACT	16
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987) 16, 17, 18
EEOC v. Wyoming, 460 U.S. 226 (1983) 13
FERC v. Mississippi, 456 U.S. 741 (1982) 8, 11, 12, 14
Fry v. United States, 421 U.S. 542 (1975) 8
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 8, 10, 12
Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 14
Leavitt v. Jane L., 116 S. Ct. 2068 (1996) 18
New York v. United States, 112 S. Ct. 2408 (1992) ..... *passim*
United States v. Lopez, 115 S. Ct. 1624 (1995) 4
United Transp. Union v. Long Island R. R., 455 U.S. 678 (1982) 13

LEGISLATIVE MATERIALS

18 U.S.C. § 922 ..... 5, 6, 14
§ 928 ..... 16, 19
27 C.F.R. § 178.102(a)(1) 13
H.R. Rep. No. 103-344 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984 ..... 2, 3, 5

OTHER AUTHORITIES

ATF News Release FY-91-36 4
Denying Handguns to Prohibited Purchasers: Quantifying the Impact of the Brady Law, Center to Prevent Handgun Violence, August 26, 1996 6
Federal Bureau of Investigation, *Uniform Crime Reports 1994* (1995) 3
L.A. Fingerhut, C. Jones, D. Makou, "Firearm and motor vehicle injury mortality—Variation by state and race and ethnicity: United States, 1990-1991," *Advance Data From Vital and Health Statistics*, No. 242, National Center for Health Statistics, Hyattsville, MD, 1994 ..... 3, 4

TABLE OF AUTHORITIES—Continued

Page

Louis Harris, "A Survey of the American People on Guns as a Children's Health Issue," A Study Conducted by L. H. Research, Inc., June 1993 4
Mortality and Morbidity Weekly Report, vol. 4 (1994) 3
Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Juvenile Offenders and Victims: A National Report*, Washington, D.C. (1992) 4
The Federalist (J.M. Dent & Sons Ltd., 1961) 11

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INTEREST OF AMICI

The Coalition to Stop Gun Violence (the Coalition), is a coalition of more than forty religious, professional, labor, medical, educational, and civic organizations

founded in 1974 to combat the epidemic problem of gun violence in the United States. The Coalition's more than 100,000 individual members are dedicated to the goal of eliminating the private sale of handguns and assault weapons in the United States.

The Educational Fund to End Handgun Violence (the Educational Fund), a nonprofit charity founded in 1978, seeks to end firearm violence, particularly as it affects children, through education, litigation, and research. The Educational Fund conducts independent research on firearms violence and collects and analyzes government statistics and studies conducted by others to better understand the serious public health threat presented by firearms violence. The Educational Fund also uses such information to evaluate the impact of proposed measures to combat firearms violence. The information collected by the Educational Fund has proven to be a valuable resource for educators, journalists, attorneys, legislators, and the general public.

The Coalition and the Educational Fund jointly file this brief to give the Court the benefit of their knowledge of, and experience with, the extensive problem of gun violence in the United States.[1]

STATEMENT

"The United States is beset by an epidemic of gun violence." [2] The level of handgun violence in the United

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[1] Both Petitioners and Respondent have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court. Amici do not have any parents or subsidiaries.

[2] H.R. Rep. No. 103-344, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1985. ("House Rep.") The House Report accompanying the Brady Act cites the following data:

> 15,377 Americans were murdered with firearms in 1992. 12,489 of these murders were committed with handguns.
>
> Gun murders in the United States increased by 41 percent between 1988 and 1992.
>
> 530,000 Americans were robbed or assaulted by firearm-wielding criminals in 1991.
>
> Armed rapists attacked nearly 15,000 women in the United States [in 1992].
>
> Two University of California economists have estimated the direct medical cost of firearms injuries at $1.4 billion annually, and the indirect cost of lost productivity at $19 billion annually.

Id.

States surpasses every developed nation in the world, *see* H.R. Rep. No. 103-344, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1985, and the numbers are staggering. During 1993 (the year that the Brady Act was passed) firearms claimed the lives of 39,595 people in the United States. *See* L.A. Fingerhut, C. Jones, D. Makou, "Firearm and motor vehicle injury mortality—Variation by state and race and ethnicity: United States, 1990-1991," *Advance Data from Vital and Health Statistics*, No. 242, National Center for Health Statistics, Hyattsville, MD, 1994. In 1994, 15,456 Americans were murdered with firearms; handguns alone were used to commit 13,483 of these murders. *See* Federal Bureau of Investigation, *Uniform Crime Reports 1994* (1995).

Before the passage of the Brady Act, these already horrifying numbers were increasing at an alarming rate. Between 1985 and 1994 the firearm murder rate rose 45.8 percent; the handgun murder rate increased 65.2 percent. *See id.* Firearm fatalities are projected to surpass automobile fatalities to become the leading cause of injury-related death in the United States by the year 2003. *See* Centers for Disease Control, "Deaths resulting from firearm- and motor-vehicle-related injuries: United States, 1968-1991," *Mortality and Morbidity Weekly Report*, vol. 4, 1994, at 37-42.

Perhaps the greatest tragedy of gun violence is its impact on our nation's children. In 1991, 5,356 children were killed by handguns. *See* L.A. Fingerhut, C. Jones, D. Makou, "Firearm and motor vehicle injury mortality—Variation by state and race and ethnicity: United States, 1990-1991," *Advance Data From Vital and Health Statistics,* No. 242, National Center for Health Statistics, Hyattsville, MD, 1994. An alarming number of young people are in possession of guns. In 1992, over 54,000 juveniles were arrested for weapons violations. *See* Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Juvenile Offenders and Victims: A National Report*, Washington, D.C. (1992) at 100. A 1990 survey found that 1 in 20 high school students had carried a gun in the past month. *See id.* at 52. When students are more concerned about their safety than their homework, the effectiveness of our schools is compromised. *See United States v. Lopez*, 115 S. Ct. 1624, 1659 (1995) (Breyer, J., dissenting).

The vast majority of the American public views the ready availability of guns as the root cause of this epidemic. *See* Louis Harris, "A Survey of the American People on Guns as a Children's Health Issue," A Study Conducted by L.H. Research, Inc. for The Harvard School of Public Health, June 1993, at 14. According to the Bureau of Alcohol, Tobacco and Firearms (ATF), there were over 211,000,000 privately-owned firearms in the United States in 1991—approximately one gun for each adult and half the children in America. *See* Bureau of Alcohol, Tobacco and Firearms, "How Many Guns?" *ATF News Release* FY-91-36, G.P.O., Washington, 1991; U.S. Department of Commerce, Bureau of the Census. It is fair to say that gun violence is one of the nation's most pressing social problems.

Congress enacted the Brady Handgun Violence Prevention Act to address this problem. Although federal

law has barred convicted felons, illegal drug users, fugitives from justice, and others from purchasing guns from federally licensed firearms dealers since 1968, Congress found that "it is clear from the number of crimes committed with firearms that criminals have relatively easy access to guns." House Rep. at 1986.

The Brady Act establishes national procedures to identify prospective gun purchasers who are prohibited by federal, state, or local laws from buying handguns by amending the Gun Control Act of 1968 to require the Attorney General to establish a national instant criminal background check system by November 30, 1998. *See* 18 U.S.C. § 922. Once this system is operational, gun dealers are required to consult it before transferring a firearm to verify that the prospective gun purchaser is eligible to buy a handgun.

Because this instant check system may not be in place until late 1998, the only practical way to address the epidemic of gun violence in the very near term is by enlisting the help of the States. Congress therefore enacted temporary interim provisions obliging state law enforcement officers to conduct the background checks. These interim provisions impose a five-day waiting period and subject purchasers to a background check during that period.[3] Firearms dealers must obtain from prospective purchasers a statement of personal information by requiring them to fill out a form prepared by ATF, the agency responsible for administering the Brady Act's interim provisions. Dealers must then transmit that form to the "chief law enforcement officer" (CLEO) of the prospective purchaser's residence.

Once a CLEO has received the information from the dealer, that official "shall make a reasonable effort to ascer-

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[3] The waiting period and background check are not required in States that have adopted permit systems meeting the standards in the Act. *See* 18 U.S.C. § 922(s)(1)(C), (D).

tain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. § 922(s)(2). If the CLEO determines that a transfer is lawful, the transferee's statement and records must be destroyed. *Id.* § 922(s)(6)(B)(i). If the CLEO determines that a transfer is illegal, the CLEO must give a written explanation if requested to do so by the prospective transferee. *Id.* § 922(s)(6)(C).

The Brady Act's interim background check provisions are working to prevent criminals and others from obtaining easy access to handguns. Since its passage, the Brady Act has prevented more than 102,800 prohibited purchasers (including over 72,300 felons—over 85 felons per day) from taking possession of a handgun. *See Denying Handguns to Prohibited Purchasers: Quantifying the Impact of the Brady Law*, Center to Prevent Handgun Violence, August 26, 1996.

SUMMARY OF ARGUMENT

1. Under established Tenth Amendment principles, the interim measures adopted by Congress in the Brady Act must be upheld. It is settled law that the federal government may direct state officers to take specific actions, and that when Congress chooses to do so, the political safeguards of federalism will protect the states from federal overreaching.

Although, in *New York v. United States*, 112 S. Ct. 2408 (1992), the Court held that it would not rely upon these safeguards to protect states' autonomy when Congress compels state legislatures to enact a federal regulatory program under the guise of state law, the Brady Act clearly does not commandeer state legislative processes. While the Brady Act does require state officers to perform minimal duties for a temporary period of time,

the statute does not implicate the same concerns underlying the decision in *New York*. Where Congress does not compel the states to legislate, but only imposes minor obligations on state officials, there is little risk that the political accountability of either the state or the federal government will be undermined.

That compliance with the Brady Act may affect a state's resource allocation decisions is no reason to find the Act unconstitutional. In a long line of cases, the Court has upheld statutes requiring states to comply with generally applicable laws without regard to the effect of those laws on the states' ability to decide how to allocate their resources.

2. Even if the minimal obligations imposed on state officers by the Brady Act raise some of the concerns underlying the exception created in *New York*, the Act must be upheld because the compelling federal interest in immediately addressing the national epidemic of handgun violence greatly outweighs the minimal burden placed on the states. Gun violence is one of the most pressing social problems in America today. The temporary duty to make a "reasonable effort" to conduct background checks, to destroy records, and to explain denials pales in comparison.

3. If any of the interim provisions are unconstitutional, they are severable from the remainder of the Brady Act. Congress has unambiguously expressed its intent that the validity of the Act not depend on the validity of any individual provision, and it is clear that the remaining provisions will be fully operative and will function in a manner consistent with the intent of Congress.

ARGUMENT

I. THE TEMPORARY BACKGROUND CHECK, RECORD DESTRUCTION, AND EXPLANATION PROVISIONS OF THE BRADY ACT ARE NOT AN UNCONSTITUTIONAL INTRUSION UPON STATE SOVEREIGNTY.

The federal government's authority to direct state officers to take or refrain from taking certain actions is well established. The Court has repudiated the notion that Congress " 'has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.' " *FERC v. Mississippi*, 456 U.S. 742, 761 (1982) (quoting *Kentucky v. Dennison*, 24 How. 66, 107, 15 L. Ed. 717 (1861)). Congress may subject States to generally applicable laws and thereby impose federal duties upon state executive officers to, for example, comply with federal wage and overtime standards in the execution of state functions. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56 (1985); *Fry v. United States*, 421 U.S. 542, 548 (1975).

Congress may also impose specific duties on state officials in the performance of their official roles. In *FERC v. Mississippi*, the Court upheld a statute which compelled State regulators to hold a public hearing to consider adopting federal standards, to issue a written opinion if the federal standards were not adopted, and to submit annual reports respecting their consideration of those standards. *See* 456 U.S. at 759-60. Although the statute at issue in *FERC* imposed direct federal obligations on state officers, it was upheld because "there is nothing in [the statute] 'directly compelling' the States to enact a legislative program." *FERC*, 456 U.S. at 765.

The imposition of such obligations poses no serious threat to state sovereignty because, as a general matter, the political safeguards of federalism will protect States from federal overreaching. *See Garcia*, 469 U.S. at 552

("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.") However, as *FERC* recognized, where Congress compels a state legislature to enact as state law a federal regulatory program, these safeguards may be inadequate because members of Congress may have competing incentives to shield themselves from the electorate's anger over unpopular programs.

It was precisely this circumstance—federal usurpation of state legislative processes—that led the Court in *New York v. United States* to hold the Low Level Radioactive Waste Policy Act unconstitutional. *New York* involved an attempt by Congress to foist the responsibility for addressing the politically charged problem of disposing of low-level radioactive waste on the States by requiring State legislatures to enact as state law a federal regulatory program or, alternatively, to accept ownership of and assume liability for the waste within their borders (which previously would have been in private hands). The State legislature thus was forced to regulate the disposal of low-level radioactive waste—either by enacting a federal policy dictating how private owners must dispose of it or by accepting ownership of the waste, which necessarily means assuming the responsibility for deciding how to dispose of it.

The statute in *New York* was unconstitutional because it " 'commandeer[ed] the legislative processes of the States' " by compelling them to adopt, as state regulation, a federal regulatory program. 112 S. Ct. at 2420 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). Such an action, of course, intrudes upon the very core of state sovereignty. Critically, "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *New York*, 112 S. Ct. at 2424. Because the legislation ultimately enacted is state legisla-

tion, it will "be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* When Congress devises a regulatory program, but state legislatures must enact it in the guise of state legislation, the political safeguards of federalism fail to adequately protect state autonomy.

Under these principles, the challenged provisions of the Brady Act must be upheld. The Brady Act does not commandeer the *legislative processes* of the States, but merely enlists state officers to help enforce a federal program for a temporary period of time. Because it is not the kind of federal mandate prohibited by *New York*, there is no reason to believe that the procedural safeguards of federalism failed to operate effectively. In fact, the inclusion in the statute of a $200 million state grant program indicates that the States' interests were well represented in Congress. *See* Brady Handgun Violence Prevention Act, P.L. 103-159 § 106(b) (1993).[4]

Although the Brady Act enlists state officers to help enforce a federal program by performing minimal duties on an interim basis, the Act does not pose anything like the threat to state sovereignty posed by the statute invalidated in *New York*. The Brady Act was enacted to require gun dealers to conduct background checks before

[4] The political safeguards of federalism identified in *Garcia* do not operate only to protect states from generally applicable laws. *Garcia* did not rely on similarly-situated private interests to protect States' interests. To the contrary, there was a suggestion in *Garcia* that the fact that the FLSA was a law of general applicability might prevent States' interests from being adequately protected in Congress. The Court rejected that suggestion, stating that "[t]he fact that some federal statutes such as the FLSA extend general obligations to the States cannot obscure the exent to which the political position of the States in the federal system has served to minimize the burdens that the States bear under the Commerce Clause." *Garcia*, 469 U.S. at 553-54.

selling a handgun; the Act is therefore ultimately a statute aimed at individuals. It is only because of the time required to establish a national instant check system and the immediacy of the problem of gun violence that Congress was compelled to enlist temporarily the help of the states.

In contrast to an effort to commandeer a state's legislative process, federal reliance on state enforcement officers to vindicate aspects of federal policy is entirely consistent with the original constitutional plan. Madison noted that collection of tax revenue for national purposes "will generally be made by the officers . . . appointed by the several States." *The Federalist* No. 45, at 237 (James Madison) (J.M. Dent & Sons Ltd., 1961). Hamilton concurred: "The national legislature can make use of the *system of each State within that State*. The method of laying and collecting taxes in each State can, in all its parts, be adopted and employed by the federal government." *The Federalist* No. 36, at 172 (Alexander Hamilton) (emphasis in original).

Petitioners nevertheless argue that the Brady Act must be struck down under *New York* because it requires States to administer a federal regulatory scheme. Petitioner Printz, defining "administer" as "to execute law or 'to discharge the duties of an office,' " Printz Br. at 23 (quoting *Black's Law Dictionary* 65 (1968)), argues that the Brady Act falls within the rule announced in *New York*. *See New York*, 112 S. Ct. at 2435 (Congress may not require states to "enact or administer" a federal program). If Printz were correct, the federal government would never be able to impose upon a state official any duty, regardless of its nature or extent. However, as discussed above, the Court has rejected the interpretation of the Tenth Amendment that would prohibit the federal government from " 'impos[ing] on a State officer, as such, any duty whatever, and compel[ling] him to perform it.' " *FERC*, 456 U.S. at 761 (quoting *Kentucky v. Dennison*, 24 How. 66, 107, 15 L. Ed. 717 (1861)). At a mini-

mum, Printz's reading of *New York* would require the conclusion that *FERC* be overruled. *New York* did not do so. It would be particularly inappropriate to read it as overruling *FERC* sub silentio because the "administer" language on which Printz relies was pure *dictum*—the case having involved federal commandeering of the legislative process.

Petitioner Mack contends that the *New York* exception should apply where Congress affects "State decisions regarding the use of its own resources." Mack Br. at 28. This contention is equally inconsistent with settled Tenth Amendment jurisprudence, and must be rejected. As the Court stated in *FERC*, squarely rejecting the argument that the statute in that case was unconstitutional because compliance with its requirements would impose financial burdens, "in a Tenth Amendment challenge to congressional activity, 'the determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States.'" *FERC*, 456 U.S. at 770, n. 33 (quoting *Hodel*, 452 U.S. at 292, n.33).

In addition, a long line of cases have held that Congress may subject state governments to generally applicable laws, even though compliance with those laws may constrain a state's ability to allocate its own resources. Surely compliance with the federal minimum wage and overtime provisions of the Fair Labor Standards Act upheld in *Garcia* affected state resource allocation decisions and constrained States' ability to set priorities even more than the minimal burdens imposed by the Brady Act. As Justice Powell noted in his dissent in *Garcia*, "[t]he financial impact on States and localities of displacing their control over wages, hours, overtime regulations, pensions, and labor relations with their employees could have serious, as well as unanticipated, effects on state and local planning, budgeting, and the levying of taxes." 469 U.S. at 578 (Powell, J., dissenting).[5]

[5] Although petitioners seek to distinguish cases concerning generally applicable laws, this diminution of state authority and control over its allocation of resources was not any less because the Act applied to private parties as well as to states.

Most importantly, the Brady Act does not undermine political accountability in the way that the statute at issue in *New York* did. Because the Act does not require the States to enact legislation or set policy, there is no material risk that accountability will be shifted from Congress to the States. There is also little danger that individuals will be confused about the locus of the responsibility for the background checks—the federal Bureau of Alcohol, Tobacco and Firearms is to administer the interim provisions and the form to be filled out by potential transferees is clearly a federal form. *See* 27 C.F.R. § 178.102(a)(1). Although state law enforcement officers are to implement the law for a temporary period of time, voters know that it is the legislature that passes the law, not the officers who enforce the law, that must be held accountable.

II. THE BRADY ACT DOES NOT CONTRAVENE THE TENTH AMENDMENT BECAUSE THE FEDERAL INTEREST IN REDUCING THE INCIDENCE OF HANDGUN VIOLENCE GREATLY OUTWEIGHS THE BURDEN PLACED ON STATES' AUTONOMY.

Even if the minimal obligations imposed on state officers by the Brady Act raise some of the concerns underlying the "no legislative commandeering" rule of *New York*, the Act must be upheld because the compelling federal interest in immediately addressing the epidemic of handgun violence greatly outweighs the minimal and temporary obligations placed on the states. *See EEOC v. Wyoming*, 460 U.S. 226, 42, n.17 (1983); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 684,

[6] In *New York*, the Court recognized that it has stated that it would "evaluate the strength of federal interests in light of the degree to which such laws would prevent the State from functioning as a sovereign" but declined to consider the argument in that case because, "[n]o matter how powerful the federal interest in-

n.9 (1982).[6] "There are situations in which the nature of the federal interest advanced may be such that it justifies state submission," *Hodel*, 452 U.S. at 288, n.29. In *FERC*, for example, the Court upheld a directive aimed solely at state officials, stating that it did not place "any particularly onerous burden on the State." 456 U.S. at 768.

The federal interest in preventing known criminals and other ineligible people from illegally obtaining handguns is of the highest order. As described above, the level of gun violence is one of the nation's most pressing social problems. Congress, and the overwhelming majority of the American people, view the sheer number of guns in the United States and their ready availability as one of the main causes of this national epidemic. Congress saw an urgent need to reduce the level of gun violence by making it more difficult for individuals to unlawfully obtain handguns, and believed that the only practical way to do so immediately was by enlisting temporarily the help of state law enforcement officers.

Contrasted to this urgent need, the duties imposed upon state officials by the Brady Act are insignificant. First, the obligations are temporary; CLEOs are required to conduct background checks only until the national instant check system becomes operational. Second, the Act requires CLEOs to make only a "reasonable effort" to determine whether the prospective purchaser may lawfully obtain a gun, and CLEOs need to check state and local records only if these records are "available." 18 U.S.C. § 922(s)(2). In an open letter interpreting this provision of the Act, ATF explained that, while the Act "anticipates some minimal effort to check commonly avail-

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volved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York*, 112 S. Ct. at 2429. Although the Court rejected the assertion that "such a federal interest would enable Congress to command a state government to enact state regulation," *id.* (emphasis omitted), the Brady Act clearly does not command the states to enact regulation.

able records," CLEOs are not required to check "every conceivable record system that may contain information relating to categories of prohibited persons" and in some circumstances, it may be reasonable for a CLEO to do little or no research. Appendix to Brief for United States on Petition for Writ of Certiorari in *Printz v. United States* at 13a-14a.

In addition, state autonomy is preserved because it is the CLEOs who decide what constitutes a "reasonable effort." As the open letter explains, each "CLEO will have to set it[s] own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction." *Id.* at 14a-15a.

Although petitioners seek to characterize the duties imposed by the Brady Act as burdensome, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *New York*, 112 S. Ct. at 2425 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Because a construction of the Act as imposing only a temporary, de minimis burden on the states is consistent with the statutory language and with the interpretation of the Act given by the agency responsible for its administration, the Court also should construe the background check requirements as imposing only a slight burden on the states. This minimal, temporary burden is heavily outweighed by the compelling federal interest in curbing immediately the pressing problem of gun violence. The interim provisions of the Brady Act thus should be upheld.

III. THE INTERIM BACKGROUND CHECK, RECORDS DESTRUCTION, AND EXPLANATION PROVISIONS ARE SEVERABLE FROM THE REMAINDER OF THE BRADY ACT.

Should this Court find any of the interim provisions of the Act unconstitutional, those provisions are severable from each other and from the remainder of the Brady Act. " '[A] court should refrain from invalidating more of the statute than is necessary. . . . [W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.' " *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)). " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *New York*, 112 S. Ct. at 2434 (quoting *Alaska Airlines*, 480 U.S. at 684).

Where a statute contains a severability clause, the inquiry into Congressional intent is eased, because "the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines*, 480 U.S. at 686. The Gun Control Act of 1968, of which the Brady Act is a part, contains such a severability clause. This clause, which states that "if any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby," 18 U.S.C. § 928, unambiguously demonstrates Congress' intent that the validity of the Brady Act not depend on the validity of any individual provision.[7]

Even absent the severability clause, it is clear that Congress intended the unchallenged provisions of the Brady Act's interim provisions—the five day waiting period, the requirement that gun dealers obtain a statement of personal information from prospective transferees and notify CLEOs of that statement, and the power given to CLEOs to veto a handgun transfer—to survive in the absence of the background check, records destruction, and explanation requirements.

Congress would have intended a provision to be severed if the remaining legislation is not "incapable of functioning independently." *Alaska Airlines*, 480 U.S. at 684. It is clear that without the background check, records destruction, and explanation requirements, the remainder of the Brady Act's interim provisions will be fully operative. A prospective handgun purchaser will be required to wait five days before obtaining a gun, gun dealers will be required to obtain a statement of personal information from prospective transferees and to give the statement to the CLEO, and CLEOs will have the power to veto a handgun transfer if they choose to do a back-

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[7] Although the Court in *Alaska Airlines* expressed doubt in that case about whether the severability clause contained in the pre-existing Federal Aviation Act applied to the severability of a provision in the later Airline Deregulation Act establishing the Employee Protection Program because that later provision "does not amend provisions of the Aviation Act or any other pre-existing statute, but instead establishes a new program," 480 U.S. at 686, n.8, the Brady Act clearly amends the pre-existing Gun Control Act of 1968. Unlike the statute at issue in *Alaska Airlines*, which expressly stated that the provision at issue "was enacted as part of the Airline Deregulation Act of 1978 and not as part of the Federal Aviation Act of 1958," *see id.*, the Brady Act clearly states that § 102(a), which establishes the interim provisions, "amend[s]" § 922 of the existing Gun Control Act of 1968. Brady Handgun Violence Prevention Act, § 102(a)(1).

ground check and if that check reveals that the prospective transferee is ineligible.

The remainder of the Brady Act will continue to "function in a manner consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685. Petitioners disagree, but all they can demonstrate is that Congress preferred the Act in the form in which it was ultimately enacted. Their citations to legislative history demonstrating that Congress intended the background check to be mandatory, not optional, are irrelevant. As the Court has recently explained, when Congress enacts a statute containing A and B, "taking away A from (A+B) will invariably clearly undermine the legislative purpose to enact (A+B). But the fallacy in applying this reasoning to the severability question is that it is not the severing that will take away A from (A+B) and thus foil the legislature's intent; it is the invalidation of A . . . which does so—an invalidation that occurs whether or not the two provisions are severed." *Leavitt v. Jane L.*, 116 S. Ct. 2068, 2071 (1996) (applying Utah state law).

Petitioners' arguments that the mandatory background check provision cannot be severed from the five-day waiting period because doing so would somehow transform the five days from an optional to a mandatory waiting period are fundamentally flawed because the five-day waiting period *was never optional*. If a CLEO *chose* to do a background check quickly and to notify the gun dealer before the expiration of the five-day period that the prospective purchaser was eligible, the transfer could occur earlier. Otherwise, the purchaser would have to wait five days. In the absence of a mandatory background check, the waiting period functions in an identical manner. If a CLEO *chooses* to do a background check, even though it is no longer mandatory, and notifies the dealer in less than five days that the purchaser is eligible, the transfer may occur before the expiration of the waiting period. Otherwise, the purchaser must wait five days.

Petitioners' claims that the requirements that CLEOs destroy records and provide written reasons for denials are not severable from the rest of the Act are similarly without merit. In the absence of these provisions, gun dealers may continue to obtain personal statements from prospective purchasers and transfer them to CLEOs who may choose to conduct a background check, destroy the records, and provide written explanations for denials. Petitioners' fears that in the absence of a destruction requirement records will be used to register gun owners and that CLEOs will arbitrarily block lawful transfers unless required to provide written explanations are unfounded and insufficient to contradict the clearly expressed intent of Congress that "if any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby." 18 U.S.C. § 928.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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